UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FIRST MERCURY INSURANCE COMPANY, Plaintiff, v. SQI, INC., et al., Defendants.	CASE NO. C13-2110JLR ORDER ON MOTION TO DISMISS OR STAY
FIRST MERCURY INSURANCE COMPANY, Plaintiff, v. SKYLINE SHEET METAL, INC., et al., Defendants.	CASE NO. C13-2109JLR

I. INTRODUCTION

Before the court is a motion to dismiss or stay brought by Defendants Ledcor Industries (USA) Inc. ("Ledcor"), and Admiral Way, LLC ("Admiral") and joined by Defendants SQI, Inc. ("SQI"). (Mot. (Dkt. # 29); SQI Not. of Joinder (Dkt. # 31).) This is an insurance coverage dispute in a construction defects case. In addition to this case, there are three cases that relate to the same underlying dispute currently pending in state court. For this reason, Defendants move to dismiss or stay this action so that the issues can be decided in state court, bringing their motion under Federal Rule of Civil Procedure 19(b) and the *Brillhart* and *Colorado River* abstention doctrines. (*See* Mot.) Having examined all pertinent submissions as well as the relevant law, and having heard oral argument, the court agrees that a stay is the best course of action and GRANTS Defendants' motion (Dkt. # 29).

II. BACKGROUND

This dispute has a complex procedural history. It involves at least 30 different insurance companies and 13 other parties that are not insurance companies. (*See* Stolle Decl. (Dkt. # 30) Exs. 3, 6.) What began as a lawsuit over roofing problems has spiraled into a veritable cornucopia of claims, cross-claims, coverage disputes, motions, and separate actions.

The underlying dispute involves construction defects in a mixed-use development known as the Admiral Way Condominiums ("the condos"). (Compl. (Dkt. # 1) ¶ 14.) In 2007, the Admiral Condominium Owners' Association ("ACOA") brought a lawsuit against the owner and developer of the condos, Admiral. (*Id.* ¶ 22.) The lawsuit was

premised on problems with the roofing in the condos. (*Id.* ¶ 19, 22.) That lawsuit was originally brought, and remains, in King County Superior Court. (*See* Stolle Decl. Ex. 1.)

Additional claims and lawsuits soon proliferated. To date, there are at least five separate lawsuits. First, the owner and developer of the condos, Admiral, brought cross-claims against the project's general contractor, Ledcor Industries (USA), Inc. ("Ledcor"). (Compl. ¶ 23.) Next, Ledcor filed a separate lawsuit in King County Superior Court against its subcontractors, including the two roofing subcontractors named in this action, SQI and Skyline Sheet Metal, Inc. ("Skyline").[1] (*Id.* ¶ 24-25.) Soon, insurance companies got involved. Ledcor and each of the subcontractors each brought several insurers into the dispute, and those insurers began to debate who had a duty to defend and provide coverage for the alleged roofing defects. (*See, e.g.*, Stolle Decl. Exs. 5-6.) This led to another action in King County Superior Court to sort out insurance coverage. (*Id.* Ex. 5.) One of Ledcor's insurers, Zurich American Insurance Company, brought a claim for declaratory judgment against Ledcor, Admiral, and ACOA, asking the court to declare that Zurich had no duty to defend or indemnify those parties. (*Id.* Ex. 4.) Before long, at least 30 insurance companies were named in the declaratory action, all of them disputing, in one way or another, who would pay for the defense costs and liability associated with the roofing defects. (*See id.* Ex. 5-6.) At present, the same judge presides over the declaratory action and the subcontractor action: the Honorable Richard

[1] Skyline has reached a settlement agreement in this matter and has withdrawn its joinder in Ledcor's motion. (*See* Dkt. ## 56, 57.)

Eadie. (*See id.* Ex. 13.) In 2011, Judge Eadie issued a partial stay of the declaratory action pending resolution of claims in the subcontractor action. (*Id.* Ex. 16.)

Into this milieu strode Plaintiff First Mercury Insurance Company ("First Mercury"). First Mercury is an insurer for named Defendants SQI and Skyline, and is defending both in the state court subcontractor action. (*See* Compl. ¶¶ 33-36.) First Mercury is also named in the state declaratory action and is having certain coverage questions adjudicated there. (*See* Stolle Decl. Ex. 5.) Nevertheless, on November 20, 2013, First Mercury filed two complaints in federal court—one against SQI and the other against Skyline. (*See* 2/6/14 Order (Dkt. # 26) at 2-3.) First Mercury asked the court to declare that it had no duty to defend or indemnify SQI and Skyline. (*See* Compl. ¶ 65.) The SQI case was assigned to Chief Judge Marsha Pechman, and the Skyline case was assigned to this court. (*See id.*) However, the SQI case was reassigned to this court as related to the Skyline case, and the two cases were consolidated shortly thereafter. (1/30/14 Order (Dkt. # 29); 2/6/14 Order at 6.) Not long after that, Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 19 and the *Brillhart* and *Colorado River* abstention doctrines.

III. ANALYSIS

As an initial matter, the court will address the abstention arguments before reaching the Rule 19 arguments. *See Wilbur v. Locke*, 423 F.3d 1101, 1106-07 (9th Cir. 2005) (holding that subject matter jurisdiction must be resolved before reaching Rule 19 arguments even where exercise of subject matter jurisdiction is discretionary), *abrogated on other grounds*, *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010).

The federal abstention doctrines are an exception to the general rule that, "[a]bsent significant countervailing interests, the federal courts are obligated to exercise their jurisdiction." *Walnut Props., Inc. v. City of Whittier*, 861 F.2d 1102, 1106 (9th Cir. 1988) (quoting *World Famous Drinking Emporium v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir. 1987)). Indeed, in the ordinary course of litigation, the mere existence of parallel state court proceedings does not excuse a federal court from exercising its subject matter jurisdiction. *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976). Instead, "the pendency of an action in state court is no bar to proceedings concerning the same matter" in a federal court. *Id.* However, there are numerous instances in which the existence of a parallel state court proceeding does justify a court in declining to exercise its subject matter jurisdiction. *See id.* at 813-17. These instances are embodied in the abstention doctrines. *See id.*

A. Brillhart Abstention

Most relevant to this case is the so-called *Brillhart* abstention doctrine. Under that doctrine, district courts have broad discretion to stay or dismiss actions seeking declaratory judgment, as recognized in *Brillhart v. Excess Insurance Company of America*, 316 U.S. 491, 494-95 (1942), and *Wilton v. Seven Falls Company*, 515 U.S. 277, 287 (1995). *See also* 28 U.S.C. § 2201 (federal courts "*may* declare the rights and other legal relations of any interested party seeking such declaration" (emphasis added)). The *Brillhart* doctrine rests on concerns about judicial economy and cooperative federalism. *Brillhart*, 316 U.S. at 495. In light of these concerns, district courts consider three primary factors when evaluating whether to abstain from hearing a case under the

Brillhart doctrine: "[1] avoiding 'needless determination of state law issues'; [2] discouraging 'forum shopping'; and [3] avoiding 'duplicative litigation.'" *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 975 (9th Cir. 2011) (quoting *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1224 (9th Cir. 1998)). The court considers each of these factors in turn.

1. Needlessly Determining State Law Issues

First, courts decline jurisdiction under the Declaratory Judgment Act in order to avoid needlessly determining state law issues. *Id.* District courts appropriately avoid determining state law when: state and federal cases raise the same "precise state law issues," state law provides the rule of decision, and the federal case involves an area of law expressly left to the states. *Cont'l Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1371 (9th Cir. 1991). This factor counsels against exercising jurisdiction when "no compelling federal interests are at stake." *Transamerica Occidental Life Ins. Co.v. Digregorio*, 811 F.2d 1249, 1255 (9th Cir. 1987); *see also Robsac*, 947 F.2d at 1371.

All of these considerations suggest that abstention is appropriate here. First, there is already a parallel proceeding in state court where FMIC's coverage arguments could be raised. (*See* Stolle Decl. Ex. 5.) There appears to be no reason why FMIC could not simply join SQI in the state declaratory action and bring cross claims against it there. At oral argument, both sides represented that the issue could be adjudicated in state court without any major procedural difficulties. In fact, counsel represented that SQI recently joined as a party in the state declaratory action. That action is before the same judge as the subcontractor action, making it a natural forum to decide the interrelated and fact-

specific coverage issues raised by FMIC. *See Dizol*, 133 F.3d at 1225. Second, there is no dispute that state law provides the rule of decision. All parties agree that Washington law applies. (*See* Resp. (Dkt. # 40) at 10-11 ("This determination involves well-established Washington law.").) Third, insurance law is an area of law expressly left to the states. 15 U.S.C. 1011 ("Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."); *Robsac*, 947 F.2d at 1371. In light of these considerations, it appears to the court that there are no compelling federal interests at stake in this case. *See id.* at 1371, *overruled on other grounds by Dizol*, 133 F.3d 1220 ("Where, as in the case before us, the sole basis of jurisdiction is diversity of citizenship, the federal interest is at its nadir."); *Digregorio*, 811 F.2d at 1255 (finding abstention appropriate because the issues raised were "more appropriate for state court resolution" and "[n]o compelling federal interests [were] at stake").

2. Forum Shopping

Second, courts decline jurisdiction over actions for declaratory relief to discourage forum shopping. *R.R. St. & Co.*, 656 F.3d at 975. Congress did not intend to expand federal jurisdiction by enacting the Declaratory Judgment Act, and a plaintiff may not use this statute to bring a claim more properly raised in a pending state action. *Int'l Ass'n of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995). For this reason, federal courts refuse to entertain reactive declaratory actions filed solely to gain a tactical advantage. *Id.* ("[T]he Declaratory Judgment Act is not to be used either for tactical

advantage by litigants or to open a new portal of entry to federal court for suits that are essentially defensive or reactive to state actions."); *R.R. St. & Co.*, 656 F.3d at 976 (quoting *Robsac*, 947 F.2d at 1371). The forum shopping analysis focuses on whether the federal case is "reactive," but does not depend solely on timing of filing. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 17 n.20 (1983) (noting that "despite chronological priority of filing," a suit may still be "a contrived, defensive reaction" to a suit in another forum).

Courts examine the "sequence of events" leading to a federal action to determine if a party engaged in forum shopping. *See Int'l Ass'n of Entrepreneurs of Am.*, 58 F.3d at 1270. For example, the Ninth Circuit in *Robsac* found that the plaintiff engaged in forum shopping by filing a federal action in response to pending non-removable state court proceedings. *Robsac*, 947 F.2d at 1371. Similarly, in *International Association of Entrepreneurs*, the plaintiff attempted to remove the state case to federal court, but filed an untimely petition. *Int'l Ass'n of Entrepreneurs of Am.*, 58 F.3d at 1268. Only after the court denied its removal petition did plaintiff file suit in federal court, and the Eighth Circuit affirmed the district court's decision to decline jurisdiction under these circumstances. *Id.* at 1270. The district court properly did not allow plaintiff "to circumvent the removal statute's deadline by using the Declaratory Judgment Act as a convenient and temporally unlimited back door into federal court." *Id.*

Based on the record before the court, it is not clear whether FMIC is engaged in forum shopping. Defendants point out that FMIC brought suit in federal court only after Judge Eadie issued a partial stay in the state declaratory action. However, the federal

actions were filed more than two years after the stay issued. (*Compare* Stolle Decl. Ex. 16 (issued September 8, 2011) *with* Compl. (filed November 20, 2013).) Thus, the "sequence of events" does not compel a finding of forum shopping. *See Int'l Ass'n of Entrepreneurs of Am.*, 58 F.3d at 1270. Further, as FMIC points out, FMIC "has already obtained a favorable result in the State Declaratory Action" on some of its claims, further undermining the theory that FMIC only filed in federal court in hopes of achieving a more favorable outcome. (*See* Resp. at 2.) There is not enough evidence for the court to conclude that FMIC filed this suit to gain a tactical advantage, unlike in *International Association of Entrepreneurs* or *Robsac*. Accordingly, this factor is neutral.

3. Duplicative Litigation

Third, courts decline jurisdiction over actions for declaratory relief in order to avoid duplicative litigation. *R.R. St. & Co.*, 656 F.3d at 975. The Ninth Circuit described an example in *Railroad Street*, where it said duplicative litigation would result if retaining jurisdiction "required the district court to address the same issues of state law and policy interpretation that the state court had been grappling with for several years." *Id.* at 976.

This factor weighs strongly in favor of abstaining. There is already a substantial amount of litigation occurring on related issues in state court. (*See generally* Stolle Decl. Exs. 1-11, 13-17.) In particular, there is already a declaratory judgment action pending that seeks to clarify the coverage issues at the heart of this dispute. (*Id.* Ex. 5-6.) That action is presided over by a judge who, for several years, has been grappling with the issues of law and insurance policy interpretation that are closely related to those FMIC

would have this court decide. (*Id.* Exs. 13-17.) Judge Eadie has invested substantial time and resources in this case, and has a significant advantage over this court in terms of factual familiarity and an understanding of the legal ramifications of various possible policy interpretations or factual findings. (*See id.*) And while there is presently no court addressing FMIC's coverage arguments as between these exact parties, exercising jurisdiction would nevertheless cause duplicative and unnecessary litigation. These issues should be resolved by Judge Eadie in the state declaratory action, not here.

4. Other Factors

In addition to the three primary factors described above, courts in the Ninth Circuit consider secondary factors as well. These factors include:

> [1] whether the declaratory action will settle all aspects of the controversy; [2] whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory action is being sought merely for the purpose of procedural fencing or to obtain a 'res judicata' advantage; or [4] whether the use of a declaratory action will result in entanglement between the federal and state court systems. In addition, the district court might also consider [5] the convenience of the parties; and [6] the availability and relative convenience of other remedies.

Dizol, 133 F.3d at 1225 n.5.

None of these factors suggest that exercising jurisdiction would be an appropriate course of action. This declaratory action would not come close to settling all aspects of the overarching controversy, particularly since FMIC's coverage findings are likely intertwined with those of other subcontractors. Further, deciding these issues creates a risk of entanglement between the federal and state court systems. Deciding this case would likely involve finding facts and deciding issues that would have an effect on not

only the state declaratory action, but possibly the subcontractor action and the underlying liability action as well. Finally, there is another convenient remedy available to FMIC: to seek relief against SQI in the state declaratory action.

The court has considered all relevant factors and concludes that abstention under the *Brillhart* doctrine is the best path forward. Accordingly, the court will STAY this case indefinitely until such time as either party demonstrates that the circumstances have changed sufficiently that *Brillhart* abstention is no longer appropriate.

B. Non-Declaratory Claims

Defendants' answers to FMIC's complaint seek non-declaratory relief against FMIC. (*See, e.g.*, Ledcor Ans. (Dkt. # 22).) Defendants raise the concern that *Brillhart* abstention may not apply to these claims. (Mot. at 18-19.) The court does not reach this issue, concluding that even if *Brillhart* did not apply to these claims, a stay would be appropriate under the court's inherent authority to stay proceedings before it. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1077 (3rd Cir. 1983). The circumstances in this case also support a stay under the standards applicable when the court stays a case pursuant to its inherent authority. *See CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55); *see also Lockyer*, 398 F.3d at 1109.

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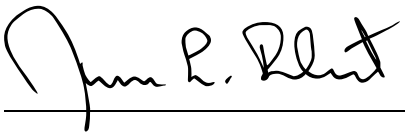
IV. CONCLUSION

For the reasons described above, the court GRANTS Defendants' motion (Dkt. # 29) and STAYS this case indefinitely until such time as either party demonstrates that the circumstances have changed sufficiently that *Brillhart* abstention is no longer appropriate and the case should proceed. If any event occurs that justifies either a lifting of the stay or dismissal of the case, the parties shall notify the court within ten days. The court also STRIKES FMIC's pending summary judgment motion in light of the stay (Dkt. # 58).

Dated this 3rd day of April, 2014.



JAMES L. ROBART
United States District Judge